

LEGAL} EAGLES CLE
Continuing Legal Education for Criminal Lawyers

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UNIFORM RULES IN VICTORIA AND NEW SOUTH WALES

Introduction

The Victorian Legal Services Board and Commissioner together with the NSW Office of the Legal Services Commissioner has informed the profession that the Legal Profession Uniform Law is expected to come into operation in NSW and Victoria in mid-2015. The Uniform Law will replace the *Legal Profession Act 2004* and the regulations and rules made under that Act.

The Uniform Law introduces common legal rules across NSW and Victoria, encompassing almost three quarters of Australia's lawyers. The scheme aims to harmonise regulatory obligations while retaining local performance of regulatory functions.

The Uniform Law will regulate the legal profession across the two jurisdictions, governing matters such as practising certificates, cost disclosure, billing arrangements, complaint handling processes, professional discipline and continuing professional development requirements.

The legislation provides for categories of Uniform Rules, which contain much of the detail of the Uniform Law scheme, including the types of provisions found in regulations and rules made under the current Legal Profession legislation.

The Australian Bar Association is responsible for developing Legal Profession Conduct Rules and Continuing Professional Development Rules for barristers.

THE UNIFORM LAW

What Won't Change Under the Uniform Law?

The Uniform Law includes transitional arrangements to minimise the disruption caused when the Uniform Law commences operation. The Uniform Law appears to re-affirm a number of the substantive rights, responsibilities, approaches and objectives already applied under the *Legal Profession Act 2004*:

- Complaints about the conduct of lawyers will still be made to the Legal Services Commissioner of each State.
- Lawyers will still lodge their practising certificate applications with the Legal Services Board if Victoria is their principal place of practice.
- Local lawyers will still be prohibited from engaging in legal practice in Victoria unless they hold or are covered by an approved professional indemnity insurance policy.

Most lawyers applying for a practising certificate will still be required to pay annual contributions to the fidelity fund set by the Legal Services Board. Barristers will not be required to make contributions to the fidelity fund.

Barristers' clerks in Victoria *may* still be approved to receive trust money on behalf of barristers. I don't know what nearly 2000 barristers will do without their clerks. We are told however the current arrangement for the receipt of trust money will continue in Victoria.

That is, the Victorian Bar may continue to approve a natural person to receive money on account of the legal costs of one or more barristers. This is a longstanding Victorian arrangement that avoids the need to have barristers receive trust money directly.

What Will Change Under the Uniform Law?

The Victorian Attorney- General has previously said, “the reforms offer the prospect of significantly reduced interstate barriers to seamless national legal practice, while improving consumer protections and safeguarding an independent legal profession”.

The Uniform Law will introduce a number of new or significantly modified elements.

- Lawyers will need to take all reasonable steps to satisfy themselves that their clients have understood, and consent to, the proposed course of action for the conduct of their matter and the estimated costs.
- Lawyers will be obliged to charge no more than fair and reasonable costs.
- The Legal Services Commissioner will have new powers to make binding determinations resolving consumer matters, including the power to make compensation orders of up to \$25,000 and to make a determination about costs that are payable if the costs in dispute are less than \$10,000.

BARRISTERS

What is a barrister under the uniform law?

Barrister means an Australian legal practitioner whose practising certificate is subject to a condition that the holder is authorised to engage in legal practice as, or in the manner of, a barrister only.

Those who are defined as barristers under the *Legal Profession Act 2004* will continue to be defined as barristers under the Uniform Law.

Legal practice with a barrister-practising certificate

A person whose practising certificate has a condition that only authorises practice as a barrister may only engage in practice as a barrister and as a volunteer at a community legal service, or otherwise on a pro bono basis.

Barristers will be bound by the Uniform Law and Uniform Rules, including Legal Practice Rules, Legal Profession Conduct Rules and Continuing Professional Development Rules.

What is going to change for Victorian and NSW barristers?

No longer will the Victorian Ethics Committee have power to grant a dispensation from the operation of a certain rule or rules (Rule 7a). The new rules vest power to waive the duty to comply with the provisions of the Rules with the Victorian Bar Council.

The NSW Proposed Legal Profession Conduct Rules: Barristers are silent on the matter.

For Victorians a major change is the introduction of a definition for *The work of a Barrister* (Rule 15). This is not something that has previously been defined in Victoria. The previous rule, Rule 120, stated that a barrister “shall not act as, or perform the work of, a solicitor save as permitted by these rules”.

New rule 17 sets out in detail what a barrister must not do.

A major change is the abolition of what, in Victoria we call a *direct access matter*. Broadly under the current rules (Part VI), *a barrister may appear in a direct access matter in the Magistrates Court or the Federal Circuit Court in a criminal proceeding* (Rule 170).

A barrister must not, except with the written permission of the Ethics Committee, accept any instructions or brief in a direct access matter: to appear in the High Court of Australia, Federal Court of Australia, Family Court of Australia, Supreme Court of Australia, County Court of Victoria (except in criminal matters where the barrister is instructed by Victoria Legal aid), or in any civil proceeding in the Magistrates' Court of Victoria or the Federal Circuit Court (Rule 171).

This prohibition has been replaced by a single rule, **Rule 24A**, *Nothing in these Rules shall be taken to oblige a barrister to accept instructions directly from a person who is not a solicitor*. Should a barrister accept instructions **Rule 24B** sets out what a barrister must do to inform the client of a number of matters including the barrister's advocacy experience.

THE RULES NEW TO VICTORIANS

Rule 38: A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

Rule 47: A barrister must not receive any money or property by way of loan from any client, the relative of a client or a business entity of which a client is a director, partner or manager,

during the course of a retainer with that client unless the ordinary business of the client, client's relative or the business entity includes lending money.

Rule 56: A barrister:

- (a) must seek to ensure that the barrister does work which the barrister is briefed to do in sufficient time to enable compliance with orders, directions, Rules or practice notes of the court; and
- (b) if the barrister has reasonable grounds to believe that the barrister may not complete any such work on time must promptly inform the instructing solicitor or the client.

Rule 58. A barrister must take steps to inform the opponent as soon as possible after the barrister has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly

The current Rule 147b " (A prosecutor) must correct any error made by the opponent in address on sentence *and fairly test any defence evidence*"

This rule, a favourite of zealous prosecutors, now becomes **Rule 93a**

A prosecutor: (a) must correct any error made by the opponent in address on sentence

Rule 70: A barrister must not confer with, or condone another legal practitioner conferring with, more than one lay witness including a party or client at the same time:

- (c) about any issue which there are reasonable grounds for the barrister to believe may be contentious at a hearing, and
 - (d) where such conferral could affect evidence to be given by any of those witnesses,
- unless the barrister believes on reasonable grounds that special circumstances require such a conference.

On the other hand the following rules, peculiar to the Victorian rules, have not found their way into the new rules.

Rule 41, A barrister shall not in questioning a witness use any document or thing so as to induce a belief in the mind of a witness, jury or court that there is documentary information to support the substance of the suggestion conveyed by a question when the document or thing does not support such suggestion.

Rule 82. A barrister shall not publish, orally, in writing or otherwise, an opinion of the professional characteristics of fellow barristers or any of them in such a way or in such circumstances as to impugn the dignity and high standing of the profession.

Rule 96. A barrister may refuse to accept or retain a brief from a solicitor to appear before a court if:

- (i) where past experience of the particular client or an essential witness is such as to give good reason to believe and the barrister does in fact believe that his or her performance in the conduct of the proceedings would be adversely affected.*

(j) where the barrister considers that having regard to other commitments, professional or otherwise, he or she may have insufficient time to give proper attention to the brief.

How the Uniform Rules play out in practice remains to be seen. At least the Bars of Melbourne and Sydney shall have their rules in common, even if each pretends to have precious little else in common with the other.

P.A.Chadwick QC

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